tion on which there is some disagreement. Upon a narrow inspection it will probably appear that usage and custom had there sanctioned just such rules for solemnizing marriage as were adopted here in this country through all the Colonies, so as to have become, in the absence of statutory provisions, the American Common Law. The accidental neglect of some *directions* in these statutes would not render the intended marriage a nullity, while the delinquent parties would be subjected to prescribed penalties for an offence against morals. Yet some form would be requisite to meet the *mandates* of our statutes, or the civil regulations established, time out of mind, under general usage.

RECENT AMERICAN DECISIONS.

In the Supreme Court of New York.

HERBERT T. MOORE *vs.* WILLIAM A. LITTEL.

In New York, where the rule in Shelley's Case is abolished, where land is granted to A. for life, and after his death, then to his heirs and their assigns for ever, the persons who, at the termination of the life estate, are the heirs of A., take as purchasers, and not by descent.

The remainder so limited is contingent, and the heirs apparent of the tenant for life have a future contingent estate, which under the statute of New York, making "future estates descendible, devisable, and alienable in the same manner as estates in possession," will pass by their grant of the land in fee.

The child of an heir apparent whose mother dies before her ancestor, will not in such case be estopped by covenants of warranty in her mother's deed.

The facts of the case appear in the opinion.

N. B. Morse, *D. E. Wheeler*, and *Everett P. Wheeler*, for the appellant (defendant below).

D. P. Barnard, for the respondent (plaintiff below).

The opinion of the Court was delivered by

LOTT, J.—This action was commenced in the City Court of

Brooklyn, on the 22d day of May, 1861, for the recovery of a lot of land lying in the city of Brooklyn, being a part of a large tract formerly owned by Samuel Jackson. He, by a deed bearing date the 15th day of February, 1832, granted and conveyed the whole of said tract to John Jackson, named therein as party of the second part, "for and during his natural life, and after his decease to his heirs and their assigns," with a *habendum* clause in the following terms, viz.: "To have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, for and during his natural life, and after his death, then to his heirs and their assigns to their own proper use, benefit, and behoof for ever."

This deed contains the usual covenants of *seisin*, and for quiet possession, and against incumbrances, and also contains a covenant by the grantor for the further assurance of the premises intended to be granted "to the said party of the second part, his heirs and their assigns, after the natural life of the said party of the second part for ever," and a covenant of general warranty thereof "unto the said party of the second part for and during his natural life, then to his heirs and their assigns for ever."

The said John Jackson, on the 25th day of April, 1848, had eleven children, who if he had then died would have been his only heirs at law, and he on that day executed a deed with full covenants and warranty to those children, purporting to convey a large tract of land, including that in question, for the consideration of one thousand dollars.

Subsequently, and on the 14th day of August, 1848, those children made a partition among themselves of the land so conveyed by their father, and executed deeds to each other with covenants of quiet and peaceable possession, to carry the same into effect. A number of lots, including that sought to be recovered in this action, were thereupon conveyed to Parmenus and Edward Jackson, two of the sons, by their brothers and sisters, and other lots were in like manner conveyed to Rosetta Jackson and Fanny Jackson, two of the daughters.

The said Parmenus and Edward Jackson afterwards, and on the

1st day of May, 1848, executed a mortgage purporting to convey the same in fee to William Beard, to secure the payment of the sum of three hundred dollars, with interest. That mortgage was subsequently foreclosed, the lot was sold on such foreclosure, and the mortgagee, the said William Beard, became the purchaser thereof, who afterwards, and on the 1st day of February, 1855, conveyed the same to Herbert T. Moore, the plaintiff.

Fanny Jackson, one of the said daughters, after the said partition deeds were executed, was lawfully married to Parker Baldwin, and continued his wife until the 3d day of June, 1859, when she died, leaving Fanning Baldwin her only child and issue, her surviving, who was born February 21st, 1859, and was living when this action was tried. Subsequent to such death of the said Fanny, and on the 5th day of March, 1861, the said John Jackson, her father, died, leaving all of said children, except the said Fanny, his survivors.

The defendant claimed to hold the premises in question as tenant of the said Parmenus Jackson, and put the title of the plaintiff, who claimed the same in fee simple, in issue. Upon the facts above stated, the City Judge, who by the consent of the parties tried the issue without a jury, decided that the plaintiff, on the 18th day of February, 1855, was possessed of the premises in question as the owner thereof in fee simple, and that the defendant, on the 1st day of May, 1860, evicted him, and unlawfully withheld the possession thereof from him, and directed judgment for the plaintiff.

This judgment was in our opinion erroneous. It was evidently the intention and object of the deed of Samuel to convey to John Jackson a life estate only, and as it was executed subsequent to the time the Revised Statutes took effect, it must be construed by the rules prescribed thereby. They expressly provide, 1 Rev. Stat. p. 725, § 28, that "when a remainder shall be limited to heirs, or heirs of the body of a person, to whom a life estate in the same premises shall be given, the persons who on the termination of the life estate shall be the heirs, or the heirs of the body of such tenant for life, shall be entitled to take as purchasers by virtue of the remainder so limited to them." This provision abrogates the rule in

Shelley's Case, under which John Jackson would have held the title in fee as absolute owner, and his heirs could only have claimed by inheritance from him.

He, by his deed, could only convey the life estate held by him, and as he did not die till the 5th day of March, 1861, that estate under his deed to his children passed and became vested in them.

The question is then presented, whether those children had any estate or interest in the remainder during the lifetime of their father, the tenant for life. The limitation in the deed is to his heirs, and by the provisions above recited it is declared that in such a case the persons who on the termination of the life estate shall be such heirs, shall be entitled to take as purchasers by virtue of the remainder so limited to them. The term "heirs" is thereby changed from a word of limitation to one of purchase, and a mere *descriptio personarum*, or specific designation of the individuals who, when the life estate determines, shall have the right to the possession and enjoyment of the property. Until that event occurs there is or can be no person in existence that answers to or falls within the description or class of persons designated, *nemo est hæres viventis*, and therefore no persons can stand in the relation of heir, or fall within the meaning of that term, until the death of the tenant for life, and upon that event the remainder becomes vested in possession. There is, nevertheless, by the very terms of the deed, an estate in remainder, created at the time of its delivery. It is, however, one in expectancy merely, limited by the terms of the grant to take effect or commence in the possession at a future day (on the death of the tenant for life), and it is therefore denominated a future estate. Such estates are said to be vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent, whilst the person to whom, or the event upon which, they are limited to take effect remains uncertain. See Rev. Stat. p. 722, §§ 7, 8, 9, 10, 11, 13, 28.

In the case under consideration, there was no person in being during the lifetime of John Jackson, as before stated, who stood or could stand in the relation or character of heir to him, and

consequently no one who could be said to have an immediate right of possession to the land on the termination of his life estate. Until that event, it remained unknown and uncertain what persons would be his heirs, and entitled to take. The remainder limited to them was therefore a contingent future estate: Such appears to be the construction put on section 28, above referred to by Chancellor KENT in his Commentaries, Vol. 4, p. 232.

He there, after quoting the section and saying that the rule in *Shelley's Case* was thereby abolished, says: "The abolition of the rule applies equally to deeds and wills, and in its practical operation it will, in cases where the rule would otherwise have applied, change estates in fee into contingent remainders." See also *Campbell* vs. *Rawdon*, 18 N. Y. Rep. 416.

Assuming then that the said children had such an estate, the operation and effect of the partition deeds executed between them remains to be considered.

It is provided by the Revised Statutes, Vol. 1, p. 725, § 35, "that expectant estates are descendible, devisable, and alienable in the same manner as estates in possession." In these are included contingent estates in remainder: Id. p. 722, § 7–11 and 13, before referred to.

Their contingent estate in remainder was therefore alienable, and it was competent for them to convey the same as well as the estate for life of John Jackson, which had become vested in them at the time their deeds were executed. They were then of full age, and competent to convey and enter into the covenants contained in those deeds.

Those executed to Parmenus and Edward Jackson conveyed all the estate and interest of their brothers and sisters at that time to them, and the mortgage from them to Beard passed to him this as well as that which was held, or to which they were entitled, in their own right; and the plaintiff, under the proceedings in foreclosure of that mortgage, and by the deed of Beard to him, became the owner, entitled to the same rights. See *Lawrence* vs. *Bayard*, 7 Paige 76.

All of those children, except Fanny Baldwin, survived John Jack-

son, their father, and they, with Fanning Baldwin, the only issue of Fanny, on his death became and were his only heirs at law, and their estate, which had before been contingent, became vested in possession and absolute; and thereupon the plaintiff became the owner in his own right in fee simple of all the estate in the lot in question, except the share (being one eleventh part) in which Fanny Baldwin, until her death, had a contingent estate. That estate determined by her death, and upon the death of John Jackson, Fanning Baldwin, who was one of the heirs at law, became vested with the title to that share in fee simple as purchaser under the deed to his grandfather, and not as heir at law to his mother. Her covenants do not, therefore, affect the title.

The result of the views above expressed is that the plaintiff was entitled to recover ten eleventh equal parts of the lot in question, being the shares of the surviving children of John Jackson, but that he had no right to the share of Fanning Baldwin (the other eleventh), which had become vested in him before the defendant entered into the possession of the premises, and which was then and has continued to be outstanding.

The judgment as to that is therefore erroneous, and must for that reason be reversed, and a new trial is ordered. Costs to abide event.

A full discussion of the effect of covenants of warranty and conveyances upon contingent interests, would transcend the limits of a note. We shall only attempt to examine the leading questions presented by the facts of the principal case, some of which were passed upon by the Court.

I. Estoppel by deed. 1. By covenants of warranty. 2. From the relation existing between the parties to the deed.

1. The doctrine of estoppel by covenants of warranty is too well settled to be shaken, but it ought not to be extended farther than the principle on which it rests requires. In cases which might easily occur, and some of which have found their way into the books (as for example, Mickles *vs.* Townsend, 18 N. Y. 575; White *vs.* Patten, 24 Pick. 324), a conveyance which would not appear on an abstract nor be disclosed by the ordinary searches, would be enforced against purchasers for value without actual notice, and defeat a regularly deduced title.

The rule is, that a deed of land in fee with covenants of warranty will estop the grantor and all claiming under him to assert a title subsequently acquired, as against the grantee and all claiming under him. Vanderheyden *vs.* Crandall, 2 Denio 9; 1 Comst. 41, s. c. in error; Jackson *vs.* Stevens, 13 Johns. 316; Brown *vs.* McCormick, 6 Watts 60; White *vs.* Patten, 24 Pick. 324, are lead-

ing cases on this subject. There are similar decisions in almost every State in the Union, which are collected in Hare & Wallace's note to Doe *vs.* Oliver, at the end of 2 Smith Lead. Cas. 545, (4th Am. ed.) See also 2 Prest. Abstr. 215, 212.

Without examining these cases critically here, it is believed that the principle on which they rest is this, that where a deed contains a direct assertion of a fact material to the contract, it would be inequitable to allow a party making the assertion to deny it, as against one who has relied upon it and would be injured by its contradiction. The object of the rule is to prevent circuity of action, for if the grantor could recover by controverting his assertion or warranty, the grantee would have a right of action for an equal amount of damages for its breach: 2 Prest. Abstr. 212; Jackson *vs.* Hubble, 1 Cow. 613; TRACY, Sen., in Jackson *vs.* Waldron, 13 Wend. 178, 207; NELSON, C. J., in Pelletreau *vs.* Jackson, 11 Wend. 117; Shelley *vs.* Wright, Willes 9; LEACH, V. C., in Bensley *vs.* Burdon, 2 Sim. & Stu. 526.

The two leading limitations to the rule as stated, flow naturally from the principle on which it rests. Where the true state of the title is apparent on the face of the deeds containing the warranty, and under which a party claims, the grantor is not estopped by his warranty, for it is evident that the grantee could not have been misled. Or in the words of COKE: "Estoppel against estoppel doth set the matter at large." Brewster *vs.* Striker, 2 Comst. 19, 39; Co. Litt. 352, *b*; 2 Preston Abstr. 209; Doe *vs.* Earl of Scarborough, 3 Ad. & Ell. 2, 12, 38; Wheelock *vs.* Henshaw, 19 Pick. 341; Hermitage *vs.* Tomkins, 1 Ld. Raym. 729; Sinclair *vs.* Jackson, 8 Cowen 543, 586. See also Right *vs.* Bucknell, 2 B. & Ad. 278; Pelletreau *vs.* Jackson, 11 Wend. 110.

The reason of the second exception to the rule as stated, will appear when its object—the prevention of circuity of action—is considered. When land is conveyed with warranty in fee, in which the grantor is seised of a less estate, the measure of damages on eviction after the expiration of the estate conveyed, is the difference between its value and the value of the fee: Tanner *vs.* Livingston, 12 Wend. 83. If, therefore, the grantor were estopped by his warranty to assert a title subsequently acquired, he would lose more than the law would award the grantee as damages. It is, therefore, well settled that "there can be no estoppel where an interest passes." Or, in the language of Prof. Washburn's learned work on Real Estate, Vol. 2, p. 476: "To bar a party by his covenant of warranty it must convey no title to the premises nor pass anything upon which the covenant can operate, for if it passes a title or interest, the covenant does not operate as an estoppel even though it cannot operate upon the interest to the full extent of the intention of the parties:" 4 Kent 98; Jackson *vs.* Hoffman, 9 Cowen 271; Lewis *vs.* Baird, 3 McLean 56, 78; Co. Litt. 47, *b*; 2 Prest. Abstr. 216. The cases cited hereafter as to estoppel between landlord and tenant are also in point.

There is a class of cases in Massachusetts which may conveniently be classified under this latter head. Doane *vs.* Willcut, 5 Gray 328, and Miller *vs.* Ewing, 6 Cushing 34, were grants of land by tenants in common, with a covenant that the grantees should hold the land conveyed "free of all right, title, interest, or claim whatever of them (the grantors), or either of them, or of their heirs or assigns, or of any person claim-

ing from, by, or under them or either of them." In Doane *vs.* Willcut, there was also a recital that the grantors were seised in fee. It was held that neither the grantors nor their heirs were estopped to assert a subsequently acquired title, whether derived from a third party or from one of the grantors. The Court considered that the covenant was satisfied by the actual seisin and estate which passed by the deeds. Such a covenant estops the grantor to deny that any interest passed by the deed. Gibbs *vs.* Thayer, 6 Cushing 30. And these cases are to be distinguished from those in which the conveyance is, not of the land, but of the grantor's interest in it. Here it is very clear that the warranty is satisfied by the interest of the grantor existing at the time of the execution and delivery of the deed, and does not affect any subsequent title: Wight *vs.* Shaw, 5 Cush. 56; Blanchard *vs.* Brooks, 12 Pick. 47.

2. Estoppels arising from the relation of the parties to the deed. After considerable controversy it is at last settled that the grantee is not, *as such*, estopped to deny his grantor's title: Blight's Lessee *vs.* Rochester, 7 Wheat. 535; Watkins *vs.* Holman's Lessee, 16 Peters 25, 51; Sparrow *vs.* Kingman, 1 Comst. 242; Averill *vs.* Wilson, 4 Barb. 180. Such cases as Jackson *vs.* Hinman, 10 Johns. 292, are substantially overruled by these later decisions. The true rule applicable to all this class of cases and subject to the exceptions already stated, was laid down by PARKER, J., in Hill *vs.* Hill, 4 Barb. 419. "There is no estoppel except where the occupant is under an obligation, express or implied, to restore the possession at some time or in some event." So also, Bank of Utica *vs.* Mersereau, 3 Barb. Ch. 528, 566. And the same case limits the obligation to the restoration of possession, and would allow the tenant after such restoration to assert a title hostile to the party under whom he entered. So the tenant is estopped to deny the landlord's title. But the exception already stated as to there being no estoppel where an interest passes, is very well established as applicable to this relation. The tenant may show as a defence, either in ejectment or covenant, for the rent, that the landlord's interest existing at the the time of the lease has expired: 1 Washb. Real Est. 359; Doe *vs.* Seaton, 2 Cr., Mees. & Rosc. 728; Franklin *vs.* Carter, 1 C. B. 750; Hill *vs.* Saunders, 2 Bing. 112, s. c. in error, 4 B. & Cress. 529.

So it is laid down that a mortgagor is bound to deliver possession to the mortgagee, and cannot assert a title acquired subsequent to the mortgage: 1 Washb. R. Est. 551; Barber *vs.* Harris, 15 Wend. 615; Doe *vs.* Vickers, 4 Ad. & Ell. 782. An exception, similar to that lastly stated as applicable to the relation of landlord and tenant, was applied to that of mortgagor and mortgagee in Right *vs.* Bucknell, 2 B. & Ad. 278.

This rule rests obviously on the common law doctrine that the mortgagor is tenant to the mortgagee. The extent to which it would be enforced in different States, would obviously depend very much upon the tendency of the jurisprudence of each to enforce the common law strictness as to mortgages. It has been held in New York that the mortgagor's tenant is not tenant to the mortgagee, and can show as a defence to ejectment by the latter, that the land has been sold under judgments senior to the mortgage: 6 Wend. 666, Jackson *vs.* Rowland. This case is hardly reconcilable with Doe *vs.* Clifton, 4 Ad. & Ell. 813. There is a class of cases sometimes cited to establish the position, that a partition between tenants in common,

followed by a continuous and peaceful possession according to the partition, estops the parties making it to deny its validity. But it is believed that all these cases will be found on examination to fall within two classes. In the first, the partition was by parol of vested interests, held under different titles by tenants in common, and the only object of the partition was to ascertain what portion each should hold in severalty: Mount *vs.* Morton, 20 Barb. 123; Jackson *vs.* Harder, 4 Johns. 202. The other class comprises partitions by deed with warranty, and the estoppel arising from such transactions is in no respect different from that raised by an ordinary deed with warranty, and subject to similar exceptions: Brewster *vs.* Striker, 2 Comst. 19, 39; Doane *vs.* Willcut, 5 Gray 328.

II. The effect of releases upon possibilities and contingent interests. The common law discourages conveyances of mere rights to parties not in possession, but favors releases to tenants of the freehold, and it was early settled that a contingent remainder, when the remainder-man was designated, and the event upon which the remainder was to vest, only was uncertain, was releasable to the tenant of the freehold, and it came finally to be treated as descendible, devisable, and assignable: Roe *vs.* Jones, 1 H. Bla. 30; Wright *vs.* Wright, 1 Ves. Sen. 409; Wilson *vs.* Wilson, 32 Barb. 328; Fortescue *vs.* Satterthwaite, 1 Ired. N. C. 570. But where the person to whom the remainder is limited is uncertain, any one in whom it might possibly vest thereafter is said to have a naked possibility only without any interest.

Whether such a possibility can be released even to the tenant of the freehold is at least a doubtful question: Lampet's Case, 10 Rep. 51, *a*, is explicit that it cannot. Most of the cases have arisen under devises to the survivor of two or more. One joint tenant could always release to his co-tenant, (*per mitter l'estate*, as the phrase was), so as to vest the entire fee in the latter. Yet in fact, he has but an estate for the joint lives with the possibility of survivorship. And there would seem to be no good reason why a party should not be able to release the possibility of survivorship when it is limited by express words as well as when it arises by construction from words of conveyance in joint tenancy. On these two points Miller *vs.* Emans, 19 N. Y. 385, was decided. The words of the devise in that case were construed to create a contingent joint tenancy, and a release by four of the tenants to their co-tenants in possession of the freehold was held to pass the possibility of the releasors' survivorship, and to enlarge the estate of the releasees. In both respects Miller *vs.* Emans is distinguishable from the second class of cases under the Medcef Eden will: Pelletreau *vs.* Jackson, 11 Wend. 110, s. c. in error, *sub nom.* Jackson *vs.* Waldron, 13 Wend. 178, 196. It is believed that these cases will yet be harmonised on the principle suggested, on which Chancellor WALWORTH based his dissenting opinion: 13 Wend. 195.

However this may be, it would seem to be well settled that a possibility without an interest cannot at law be released or assigned to a stranger: 3 Prest. Abstr. 5, 6; 2 Id. 95, 96, 205; Doe *vs.* Tomkinson, 2 Maule & Sel. 165; 4 Kent 260; 4 Cruise Dig. 303, tit. 32, ch. 23, § 1; Nicoll *vs.* N. Y. & Erie Railroad, 12 N. Y. (2 Kern.) 121; Jackson *vs.* Catlin, 2 Johns. 248, 261; and Lampet's Case and the Medcef Eden Cases already cited.

When a remainder, as in the principal case, is conveyed or devised to the heirs of a person yet living, the heir apparent

has such a naked possibility only: 4 Kent 207; Fearne on Remainders 371; Campbell *vs.* Rawdon, 18 N. Y. 412; 1 Hilliard Real Est. ch. 41, § 18, 33, pp. 515, 517 (3d ed.), and the cases lastly cited.

This will be seen even more clearly by an allusion to the doctrine of abeyance. Fearne, it will be remembered, maintained that the fee was never in abeyance, but, in case of a feoffment with livery to A. for life, remainder in contingency, remained in the feoffor until the remainder vested. Preston, Cornish, Kent, and the other text-writers who controvert this position, agree that the fee does not pass, even in case of a feoffment, to the contingent remaindermen, and the authorities are uniform that in conveyances deriving their effect from the Statute of Uses, "if the use of the fee be limited in contingency, the fee will result to the grantor till it can vest." And it will descend to his heirs: 2 Preston Abstr. 83, 99; Fearne on Remainders 528; 4 Kent 257; Greenleaf's note to 2 Cruise 330, tit. 16, ch. 8, § 2. And grants are assimilated to conveyances to uses: 4 Cruise 52, tit. 32, ch. 4, § 41–44.

If, therefore, the fee is in the grantor and descends to his heirs, it is difficult to see how a conveyance by a person who may possibly acquire it subsequently can affect it, other than by way of estoppel, or contract to convey.

III. The assignability in equity of possibilities and contingent interests. On this subject there are conflicting authorities. On the one hand Lord ELDON declares, in Carleton *vs.* Leighton, 3 Meriv. 667, that the expectancy of an heir presumptive is not capable of being made the subject of a contract. It is to be observed, however, that the case did not call for such a remark. An assignment in bankruptcy was decided not to pass such an expectancy. On the other hand Judge STORY, 2 Eq. Jur. § 1040, *c*, *d*, says that contingent interests and expectancies may be assigned in equity. See, however, § 1021, and 4 Kent 144. It is believed that whenever such an assignment has been enforced it has been as a contract to convey; and that all possibilities, whether coupled with an interest or not, may be made the subject of such a contract. But the party claiming under it must aver and prove that he bargained and paid for that precise interest or possibility, for an adequate and valuable consideration in good faith: Varick *vs.* Edwards, 5 Denio 664, 690; 1 Powell Mortg. 17, 18; Pope *vs.* Whitcombe, 3 Russell 124; Whitfield *vs.* Fausset, 1 Ves. Sen. 387; Trull *vs.* Eastman, 3 Met. 121; Harwood *vs.* Tooke, 2 Simons 192; Beckley *vs.* Newland, 2 P. Wms. 182. It is to be observed, however, that personalty was the subject of the contract in the two latter cases.

How far this doctrine is modified by such statutes as that of New York, quoted in Judge LOTT's opinion, remains to be ascertained by judicial decision. It may be maintained with plausibility, at least, that possibilities are not estates and so not included in the terms of the statute, and that estates in possession are not alienable by those who have no interest in them. But it is not proposed to enter into a criticism upon the principal case, for similar questions, arising under the same title, will probably soon come before the New York Court of Appeals.

E. P. W.